OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida and Florida Supreme Court are as yet unreported. Such opinions are appended hereto (Appendix p. 20).

JURISDICTION

The Petition for Rehearing to the District Court of Appeal was denied on October 8, 1969, and Petition for Writ of Certiorari was denied by the Florida Supreme Court on January 30, 1969, for lack of jurisdiction. The jurisdiction of this Court is involved under 28 U.S.C. 1257 (3) and the First, Fifth and Fourteenth Amendments to the United States Constitution.

The matter is of great public interest because there is involved the question of whether the doctrine of *New York Times v. Sullivan*, 376 U.S. 254 (1964) is limited so that the press cannot with impunity publish false and libelous articles which tend to restrict freedom of speech amongst elected city councilmen engaged in hot debate.

QUESTIONS PRESENTED

1. Whether a State court can avoid deciding a federal question and thereby defeat jurisdiction of the United States Supreme Court by putting forward non-federal grounds of decision which are without fair support?

2. Whether the First Amendment to the United States Constitution as defined in *New York Times v. Sullivan*, extends so far, that the mayor of a city is precluded from a jury trial of the issues in a suit for libel which complains that the press knowingly, falsely and maliciously published a report accusing him of religious bigotry during council meetings?

(a) Whether the Constitutional protections of freedom of speech, as defined in *New York Times* allow a trial court to dismiss without trial a fact issue that the press, with actual malice, knowingly and falsely accused a public official of tolerating religious bigotry in his capacity as mayor?

3. Whether the press is thus rendered immune to a jury trial on the fact of actual malice when it publishes a false article accusing the mayor of a city, of religious bigotry because he extended the guaranty of freedom of speech, during hot debate, to elected councilmen?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 1 to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 5 to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14 to the Constitution of the United States, provides:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1257 (3) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of Certiorari when the validity of a treaty or statute of the United States is drawn in question or where the validity of a State's statute is drawn in question or the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

STATEMENT OF THE CASE

This case involves the right of the mayor of a city, who is also a practicing attorney, to a jury trial when there is at issue actual malice and falsity in a newspaper article accusing him of tolerating religious bigotry amongst his councilmen because he did not restrict their right to freedom of speech during spirited debate.

Petitioner at the time of the alleged libel was mayor of the City of North Miami Beach, Florida and an attorney at law practicing his profession in that city. He alleged in his Complaint (R. 2, T. 1-5) and Amended Complaint (R. 2, T. 2, 3, 14-17, 20) filed in the Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida, that respondent published an article which accused petitioner of condoning religious bigotry within the City Council meetings over which he presided (R. 2; T. 14-17). The Complaint as amended alleged that respondent had falsely, knowingly, with knowledge of the falsity, and maliciously (R. 2, T. 2, 3, 14-17, 20) published the article. Respondent filed motion to dismiss the original complaint, for failure to state a cause of action (R. 2, T. 6) stating, inter alia, that the complaint failed to allege actual malice and further that the matters complained of did not constitute libel per se. The trial court denied the motion (R. 2, T. 7) and respondents then answered (R. 2, T. 8-10), admitting the publication, and further alleging privilege under the First and Fourteenth Amendments to the United States Constitution (R. 2, T. 9), guaranty of freedom of speech and of the press, and privilege under the Fifth and Fourteenth Amendments due process clause (R. 2, T. 10). They further defended that their article referred to the official actions of a public official and that it was published without malice and therefore unactionable under the protection afforded by the First and Fourteenth Amendments (R. 2, T. 10). At the pre-trial conference, peti-

tioner emphasized the United States Constitutional issues involved when he amended his Complaint, by calling the court's attention to *Beckley Newspaper Corporation v. C. Harold Hanks*, 339 U.S. 81 (1967), which dealt with *New York Times v. Sullivan*, (R. 2, T. 20). Petitioner stated that his motive was to abate any possible future problems in meeting the *Sullivan* test (R. 2, T. 20). Respondents at that time, were allowed to insert an additional federal constitutional defense, which they declared was espoused in *Garrison v. Louisiana*, 379 U.S. 64 (1964) (R. 2, T. 21-22). Respondent later made a Motion for Summary Judgment and the court entered its order (R. 2, T. 25), not for summary judgment, but for failure to state a cause of action, which was the original ground in respondent's motion to dismiss. The Court stated that it had considered *New York Times* and other Supreme Court decisions and that on motion for summary judgment involved whether a genuine issue of fact as to actual malice existed (R. 2, T. 25). The Court decided it was unnecessary to rule on that issue of fact since it was dismissing with prejudice because the article failed to come within the Florida definition of libel per se (R. 2, T. 26).

Petitioner appealed to the District Court of Appeal, Third District, which affirmed the trial court per curiam (R. 2, T. 30). No opinion was rendered by the appellate court beyond, "see *Adams v. News-Journal Corporation*, 84 So.2d 549 (Fla. 1955) and cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct., 710 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964)" App. p. 20). Petitioner applied for rehearing (R. 31), which was denied (R. 2, T. 33), alleging that the appellate court had overlooked the allegation of actual malice, which would, under the *Sullivan* doctrine, vitiate any protection of free speech. Petitioner then sought a Writ of Certiorari in the Supreme Court of Florida (R. 1). The Supreme Court of Florida denied the writ, stating that it lacked jurisdiction (R. 4).

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT OF APPEAL HAS DECIDED THE CASE BY RAISING NON-FEDERAL GROUNDS WHICH ARE WITHOUT FAIR SUPPORT, WHICH SHOULD NOT BE ALLOWED TO DEFEAT JURISDICTION OF THIS COURT.

The trial court considered the United States constitutional issues at the pre-trial conference and then decided to dismiss the suit because in its opinion the article was not libelous per se. A study of case law in Florida reveals that a publication is libelous per se if, inter alia, it imputes to another, conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office. *Miami Herald Publishing Co. v. Brautigam*, 127 So.2d 718 (Fla. 3rd Dist. 1961), *cert. den.* Supreme Court of Florida, 135 So.2d 741, *cert. den.*, United States Supreme Court, 369 U.S. 821. The Florida Supreme Court has held that in determining the basic question of whether language is defamatory the words used are to be construed in that sense in which they must be understood, in which the common mind would understand them. *Loeb v. Geronemus*, 66 So.2d 241, 245 (Fla. 1953). In *Hevey v. News-Journal Corporation*, 148 So.2d 543 (Fla. 1st Dist. 1963), a suit by a city commissioner against a newspaper, the court stated that several paragraphs in an article did not independently or collectively equal libel per se in their particulars, but that con-

struing the editorial as a whole, it was actionable per se in that by clear innuendo and inference it charged the plaintiff with misconduct in office. In *Hevey*, the trial court had, as in the case at bar, dismissed the action with prejudice. But the First District Court of Appeal of Florida reversed and remanded. In the Third District Court of Appeal of Florida, whence comes the present case, that court followed *Hevey* in *Hawkins v. State*, 204 So.2d 545 (Fla. 3rd Dist. 1967). In *O'Neal v. Tribune Company*, 171 So.2d 548, 549 (Fla. 2d Dist. 1965), the court, in holding that a newspaper article had no qualified privilege because it did not conform to the requirements of fairness and accuracy, stated: "There is a great difference in saying that someone has been beaten and imputing a charge that someone has done the beating."

The ruling of the trial court below was affirmed by the appellate court on the basis of *Adams v. News-Journal Corporation*. In *Adams*, an attorney sued a newspaper for publishing an article accusing the attorney of falsely and irresponsibly accusing policemen of brutality. The Florida Supreme Court on the issue of libel per se, stated that such statements are of that character when, considered alone without innuendo, they contain charges that a person has committed an infamous crime, contracted an infectious disease, carry statements tending to subject a person to hatred, distrust, ridicule, contempt, or disgrace, or to injure a person in his trade or profession. But the Florida Supreme Court in *Adams* stated that the judgment in each case must depend upon the facts peculiar to that case. That court further interpreted the article under its scrutiny under the "common mind" doctrine set out in *Loeb*. *Adams* is distinguishable from the case at bar, in that in *Adams*, the Florida Supreme Court analyzed each

paragraph and concluded that the article only criticized a system. Furthermore, no demand for retraction had been made upon the newspaper, whereas petitioner demanded and the newspaper refused to retract. The instant case is more readily analogyzed to *Brautigam*, which came some six years after *Adams*, and which also went to the Supreme Court of Florida, which transferred it back to the Third District Court of Appeal of Florida, stating that inherent in the judgment was construction of controlling provisions of the Florida and Federal Constitutions, and that a libel action which was indistinguishable from other libel suits and which was not one in which the Court did in fact construe a controlling provision in either Constitution was one over which the Supreme Court of Florida did not have jurisdiction on direct appeal. In *Brautigam* the Third District Court of Appeal of Florida had transferred the cause to the Florida Supreme Court on the ground that inherent in the judgment there was the construction of controlling provisions of the Florida and Federal Constitutions guaranteeing freedom of the press. In *Brautigam*, the plaintiff was a State's Attorney who won a suit which was similar in many respects to the instant case: The libel was directed at a public official for allegedly not acting responsibly toward the grand jury. The trial court let the issue go to the jury. The Third District Court of Appeal affirmed the judgment in favor of the public official by holding that freedom of speech and press do not carry with them freedom from responsibility in the misuse of those rights. The court then outlined the elements of libel per se (enumerated in *Adams*) and further stated that the article fell within the definition. The article libelling petitioner is similar to the article which libelled Brautigam and specifically underwent the scrutiny of the same appellate court which decided for Brautigam (App. p. 22).

The appellate court in the instant case stated that *New York Times* followed the *Adams* decision (App. p. 20). It is obvious that *New York Times* interpreted the United States Constitution and set out a federal guideline which requires proof of actual malice as a prerequisite to a libel suit against a newspaper by a public official. Thus, *Adams* and *New York Times* are not related in their concepts.

A State court may not avoid deciding federal questions by putting forward non-federal grounds of decision which are without any fair or substantial support. *Wolfe v. State of North Carolina*, 364 U.S. 177, rehearing den. 364 U.S. 856 (1960). The instant case was not properly decided under state law; the federal guideline set forth in the decision of the Court in *New York Times* and subsequent cases should have controlled. The appellate court while delivering an ambiguous decision, seemed to consider the *New York Times* decision as controlling, but did not remand to the trial court to correct its decision to conform to the *New York Times* doctrine.

II.

THE DISTRICT COURT OF APPEAL ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT RELATIVE TO THE FREEDOM OF THE PRESS AND HAS ALSO DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SETTLED, i.e. THE APPLICATION OF THE NEW YORK TIMES DOCTRINE TO THE SITUATION WHERE A PUBLIC OFFICIAL WHO IS ALSO A PRACTICING ATTORNEY IS BRANDED A RELIGIOUS BIGOT BECAUSE HE PROTECTED FREEDOM OF SPEECH.

The trial court erroneously decided that *New York Times* did not apply even though the public official who was also an attorney, alleged malice in his complaint as amended. The District Court of Appeal of Florida correctly decided that *New York Times* did apply but it misconceived the doctrine.

It is recognized that punishment for the abuse of the liberty accorded the press is essential to protect the public but that the common law rules subjecting one who libels to responsibility for the public and private offense are not abolished by our *Constitution, Near v. Minnesota*, 283 U. S. 697 (1931). The facts are, as shown in the defamatory article, that the libel occurred during pre-election campaigns in a community which is sensitive to religious bigotry. It has long been recognized by this Court that

limitations are placed on freedoms of expression during exceptional periods; *Schenck v. United States*, 249 U. S. 47 (1919). In *New York Times v. Sullivan*, and *Garrison v. Louisiana*, 379 U. S. 74C (1964), this court held that under the First and Fourteenth Amendments, a state court cannot award damages to a public official for a defamatory falsehold relating to his official conduct unless the official proves actual malice and that the falsehood be published with knowledge of its falsity or with reckless disregard whether it was true or false.

In the instant case, petitioner, in his compliant, as amended, made these allegations and thus came to issue with respondent, but the appellate court affirmed the trial court's dismissal on the basis of *New York Times*, without petitioner's being given an opportunity to prove his allegations. It is submitted that denial of the right to prove actual malice is a deprivation of procedural due process under the Fourteenth Amendment, since state law allows fact issues to be tried by jury, and it is unfair that petitioner be denied this right in contravention of usual court practices. If a statement at issue is an explicit charge of corruption, this Court assumed in *Rosenblatt v. Baer*, 383 U. S. 75 (1966), without deciding, that a public official might recover. Here, respondents' article explicitly stated that petitioner allowed bigotry to prevail at city council meetings, and that he was the only man who could have prevented such conduct. In *Rosenblatt*, Mr. Justice Brennan, stated: "Moreover, even if the claim falls within *New York Times*, the record suggests respondent may be able to present a jury question of malice as there defined." In the same case, Mr. Justice Douglas, in his concurring opinion, stated: ". . . The question in final analysis is the extent to which the Due Process Clause of the Fourteenth

Amendment has displaced the libel laws of the States . . . Some think that due process as applied to the State is a watered-down federal version as respects the guarantees in the Bill of Rights that are incorporated into the Fourteenth Amendment. . . . That has been the minority view . . . [T]he question is whether a public *issue*, not a public official is involved." The facts show that both a public official and a public issue are involved, when a publication accuses the official of bigotry. Furthermore, the attack here was a personal attack directed at a practicing attorney, endangering his right to earn a living.

Although this Court has never directly decided whether freedom of press extends to the point where a public official can be libeled by the press with impunity, as one who tolerates religious bigotry, because he himself has extended constitutional freedom of speech protections to legislators or others, its past decisions indicate that *New York Times* will not extend freedom of the press to that degree. In several cases, this Court held that the First and Fourteenth Amendment protection of freedom of press will be extended except in those instances when there is a clear and present danger of interference with the orderly administration of justice. *Bridges v. California*, 314 U. S. 252 (1942); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Wood v. Georgia*, 370 U. S. 375 (1962). Thus it is reasonable to assume that the federal guideline is the "clear and present danger" test when determining whether the press is immune from libel. Mr. Justice Henry Billings Brown stated that in a democratic country it is especially desirable that public life should be made attractive to men of education, good family, and refined instinct; but if their entrance to it is greeted by storms of abuse, vituperation and unjust aspersions on their character, it ought to be

no matter of surprise if they abandon the field to men of coarser fiber. Vol. II p. 127 *The Brief*, Phi Delta Phi (1899). Thus, under certain circumstances, there is a clear and present danger to the proper administration of small cities of our country when the press is allowed unbridled, false and malicious attacks upon public officials whose means of earning a living are from outside sources, rather than from the public payroll, and who serve as officials from a sense of civic duty.

In *Terminiello v. City of Chicago*, 337 U. S. 4, 5 (1949), Mr. Justice Douglas, in the majority opinion stated,

> ". . . [A] function of freedom of speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantial evil that rises far above public inconvenience, annoyance or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

The instant case fits within the rule of *Terminiello:* Not only is there the clear and present danger of preventing upright citizens from seeking office in small communities, because of malicious and false libel, but there is also the clear and present danger that our legislators will be restricted in their freedom of speech by persons such as petitioner, who otherwise recognize its value as outlined in *Terminello;* and further, there is a present danger of the substantial evil of the press, especially in our small communities, of censoring the very speech sought to be protected, and imposition of private ideas and ideologies by the press on those who are elected to govern, under the threat of using its freedom of press protection as a sword and not a shield.

CONCLUSION

The State court has decided federal questions which conflict with decisions of this Court. Furthermore, if a presiding public official who is also a practicing attorney is obligated to protect freedom of speech of legislators and if *New York Times*, protects freedom of speech of the press, there must be a point at which one facet of First Amendment protection of free speech must yield to yet another facet of that same Amendment. That yield point is determined by a proper application of the limitations expressed in *New York Times*, and recognition of a clear and present danger such as is evidenced by this case. Petitioner is entitled to a jury trial on the fact questions of whether there is a personal issue and whether actual malice is involved.

WHEREFORE, for the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the decision of the Florida District Court of Appeal for the Third District.

Respectfully submitted,

BURTON YOUNG
Attorney for Petitioner

1799 N.E. 164th St.
North Miami Beach, Florida

INDEX TO APPENDIX

	Page
Opinion of Supreme Court of Florida	20
Opinion of District Court of Appeal In And For The Third District, Florida	21
Newspaper article held to be libel per se, as reproduced in the opinion *Miami Herald v. Brautigam*, 127 So.2d 720, 721 (1961)	22-25

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

CASE NO. 68-146

JULY TERM, A.D. 1968

ARTHUR I. SNYDER,

Appellant,

vs.

JOURNAL PUBLISHING COMPANY,
a Florida corporation,
W. H. HARWELL, JR. and
BILL ROBERTSON,

Appellees.

Opinion filed September 10, 1968.

An appeal from the Circuit Court for Dade County, Thomas E. Lee, Jr., Judge.

Snyder, Young & Stern, for appellant.

Scott, McCarthy, Steel, Hector & Davis and Dwight Sullivan, for appellees.

Before PEARSON, HENDRY and SWANN, JJ.

PER CURIAM.

Affirmed. See Adams v. News-Journal Corporation, Fla. 1955, 84 So.2d 549; cf. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686, 95 A.L.R.2d 1412 (1946).

(TITLE OMITTED)

CASE NO. 37,937

DISTRICT COURT OF APPEAL,

THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

CC: Hon. W. P. Carter
Hon. E. B. Leatherman
Messrs. Snyder, Young & Stern
Messrs. Scott, McCarthy, Steel, Hector & Davis

MIAMI HERALD PUBLISHING CO.,
a Florida corporation,

Appellant,

vs.

DOROTHY M. BRAUTIGAM, as Administratrix of the Estate of George A. Brautigam, Deceased,

Appellee

NO. 58-409

District Court of Appeal of Florida

Third District

March 9, 1961

Rehearing Denied March 23, 1961

* * * * * * * *

"People Have the Right to Know

"Why Does State Attorney Muzzle The Grand Jury?

"The Action of George A. Brautigam, state attorney, in throwing a road block in front of a hard-working, conscientious Grand Jury, raises two immediate questions:

" 'Is he afraid of something, or of someone?'

" 'Is he trying to protect someone?'

"Neither may be the reason, but the State Attorney has invited both questions.

"The Grand Jury is the people's agency of investigation.

"It supplements the work of the State Attorney, who is the people's prosecutor in important cases.

"His office, however, is not above the Grand Jury's attention.

"When the State Attorney and the Grand Jury are in conflict, as in this instance, the people's rights are in jeopardy.

"In asking Judges [sic] Robert L. Floyd of Circuit Court to withhold the jury's report, Brautigam is off the track of his public responsibility. We think the judge should have told him so instead of granting his request.

* * *

"As Long as Brautigam stands in the untenable position of asking the court to keep the jury's findings from the people he invites suspicion.

"He can remove it only be reversing his course; By making available to the people, who have the right to know, what the Grand Jury has uncovered.

"As it stands, Brautigam, the man the people elected to represent them, has run out on them.

"Who will speak for the people in Judge Floyd's court Monday?"

"Who Will Represent the Public?

"State Attorney Brautigam Runs Out On The People

"This Afternoon at 2 o'clock, the people's right to know what its own agency, the Grand Jury, is doing will be tested before Judge Robert L. Floyd in Circuit Court.

"Who will represent the people in this outlandish situation in which they have been blocked by court order from being told what their Grand Jury wants to tell them in the interest of law and order.

"State Attorney George Brautigam was permitted by Judge Floyd to withhold release of the jury's report until Brautigam had a chance to review the contents. It was highly unusual, if not unprecedented procedure.

"Brautigam is the people's lawyer through the office that he holds.

* * *

"Judge Floyd should take full cognizance of the fact that in seeking even a temporary suppression of the jury's report, Brautigam was not the servant of the people. He ran out on them.

"Judge Floyd should see to it that the people are ably and immediately represented if he feels that his judicial position prevents him from assuring the people in their right to know.

"The Dade County Grand Jury Association should get in touch with Gov. LeRoy Collins, point out that Brautigam turned his back on the people who employ him

as well as on his job when he got the court to hold release of the jury's report, and demand his replacement.

"The people of this county will watch with concern and long memories how their rights are safe-guarded by interested officialdom this afternoon."

"*People Have the Right to Know*

* * * * * * * * 127 So.2d 720, 721 (1961)